MARGARET S. MUSE, HIPPOLYTE FILBIOL, et al.,
Plaintiffs in Error,

vs.

THE ARLINGTON HOTEL COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

J. G. CARLISLE,
LOGAN CARLISLE,
For Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

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vs.
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Defendant in Error.

No. 59.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This case comes up on a writ of error from the United States District Court for the Eastern District of Arkansas, Western Division, and it seeks the reversal of a judgment sustaining a demurrer to plaintiffs' complaint and amended complaint, and, also, defendant's exceptions to the documentary evidences of title on which plaintiffs gave notice they would rely on the trial of the suit.

Plaintiffs in error filed their original complaint in ejectment July 25, 1894 (Record, p. 2), to which defendant demurred (Record, p. 7). Thereafter, the defendant moved the court to require plaintiffs to file the originals of the documents exhibited with their complaint (Record, p. 8), and, later, filed certain exceptions to these exhibits (Record, p. 8). Plaintiffs were allowed fifteen days within which to file such originals (Record, p. 8), and, thereafter, filed certain photographs and certified

copies of them (Record, p. 9), which photographs, by stipulation, are omitted from the printed record; but the original documents will be produced on the hearing.

Plaintiffs offered (Record, p. 9) to file a motion to strike defendant's exceptions from the files, but this motion was overruled, to which plaintiffs excepted (Record, pp. 9–10).

Pending the demurrer, plaintiffs filed an amended complaint (Record, pp. 9–10), in which they say that defendant is a corporation organized under the laws of Askansas and doing business in the city of Hot Springs, in that State; that, except Alice F. South, who is a citizen and resident of Coahuila, Mexico, they are all citizens and residents of the United States, some of Louisiana, some of Texas, some of Mississippi, and the other of Illinois; that they are the only heirs at law of Don Juan Filhiol, who died intestate, a citizen of the territory of Louisiana, in 1821, and that they are the owners in fee of the league of land described in the amended complaint.

They allege that their ancestor, the said Filhiol, was born in France in 1740, and that he left that country in 1763, going to San Domingo, whence he went to Philadelphia, in 1779, expecting to return with the Count D'Estaing to France, but that he changed his destination, and arrived in New Orleans in May, 1779, where he joined the volunteers in the war between Spain and England; that, in 1783, he was appointed by the King of Spain captain of the army and commandant of the militia, and assigned to duty at the post of Ouachita, in the province of Louisiana, under instructions from Don Estevan Miro, governor-general of the province.

They allege that, on December 12, 1787, said Filhiol memorialized the governor of Louisiana and West Florida for a grant of land, and that the governor ordered a survey of the land for which he applied, and that, before February 22, 1788, Don Carlos Trudeau, surveyor-general of Louisiana, made a survey of the same in accordance with the law as it then existed, and made a report of the survey, with a figurative

plan and procès verbal in due form, in and by which the land was described as follows: A tract of land with a front of 84 arpents and a depth of 42 arpents on each side of the stream called "La Source d'eau Chaude," about two leagues distant from its entrance into the Ouachita, having the Hot Springs for its center, its limits extending in parallel lines east and west to its full depth and bounded on both sides by lands belonging to the Crown. They say that the survey, figurative plan and procès verbal have been lost or destroyed and that they cannot produce them, and they allege that, on February 22, 1788, the said Miro, as governor, made and delivered to said Filhiol, a grant of one league of land, the description of which appears in the amended complaint.

They say that said grant was made while said Filhiol was acting as commandant of the post of Ouachita, as a reward for his civil and military services in his capacity as such commandant; that the said Miro, as governor, was, by the Spanish colonial laws, vested with power to make grants of land and convey by such grants the absolute fee simple to the lands granted.

It is alleged that the land granted by Miro to Filhiol consisted of a certain one square league with the Hot Springs, at the city of Hot Springs, as its center, the description, metes and bounds of which are more accurately measured and described in the survey, figurative plan and procès verbal; and that the grant is in the Spanish language, but that, translated into English, it is as follows:

FROM THE LAND ARCHIVES.

The governor and intendent of the provinces of Louisiana and Florida West and inspector of troops, etc.:

Considering the anterior surveys made by the surveyor of this province, Don Carlos Trudeau, concerning the possession given to Don Juan Filhiol, commandant of the post of Ouachita,

of a tract of land of one square league, situated in the district of Arcansas on the north side of River Ouachita, at about two leagues and a half distance from said River Ouachita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides expressed by the figurative plan and certificate of said surveyor Trudeau above named, and recognizing this mode of measurement, we approve those surveys, using the faculty which the King has vested in us, and assign in his royal name unto the said Julian Filhiol the said league of land in order that he may dispose of the same and of the usufruct thereof as his own.

We give these presents under our own hand, sealed with the seal of our arms and attested by the undersigned secretary of His Majesty in this government and intendence.

28 In New Orleans, on the 22nd day of February, 1788.

(Signed) ESTEVAN MIRO.

By mandate of His Excellency:

(Signed) ANDRES LOPEZ ARMESTO.

Registered. (Record, p. 12.)

They say that, after the delivery of this grant to Filhiol, and on December 6, 1788, Carlos Trudeau, land and particular surveyor of Louisiana, made, executed and delivered to the grantee a certificate of measurement of said land, a translation of which they set forth, as follows:

Don Carlos Trudeau, land and particular surveyor of the province of Louisiana, in consequence of a memorial signed on the 12th of December, of the year 1787, by Don Juan Filhiol, commandant of the post of Ouachita, and by order of His Excellency Don Estevan Miro, brigadier of the R. ex. gob., intendent of the province of Louisiana, West Florida, etc., dated the 22nd of February, 1788, directing me to give

possession to the aforesaid commandant of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of the Warm Waters, and in conformity with the aforesaid order, I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouachita river in the district of Arkansas, at about two leagues and a half distant from said river to be verified by the figurative plan which accompanies in conformity with * * * of the 6th of the present month of December and of the current year 1788.

(Signed) CARLOS TRUDEAU.

(Record, p. 13)

Plaintiffs allege that the making and delivery of this certificate was a delivery of the judicial possession of the land and had the force and effect of segregating the land from the public domain, and, with the grant, vested full and complete title in the grantee.

They further allege that Filhiol sold and conveyed this land, on November 25, 1803, to his son-in-law, Narcisso Bourgeat, passing the deed before Don Vinciente Fernandez Fegevio, lieutenant of the regiment of infantry of Louisiana and military and civil commandant of the district and jurisdiction of Ouachita, the deed being witnessed by Señor Baron de Bastrop, and Don Jose Pomet, who signed the act in the presence of Don Alex. Breard and Don Carlos Bettin, all whom were principal men at Ouachita at that time. Translations of this deed and a deed from Bourgeat reconveying the land to Filhiol, dated July 17, 1806, and passed before J. Poydras, judge of the Parish of Pointe Coupee, are filed with the pleading—Record, 13, 14, 15.

They say that the deed was immediately reported to the proper office of the province of Louisiana and was afterwards duly recorded. Copies of this deed and of the deed of retrocession from Bourgeat to Filhiol, the former in Spanish, and the

latter in French, properly certified by the officers in charge of them, are exhibited with the amended complaint, the originals being kept on file as required by law, and the allegations are made that Bourgeat retroceded the land to Filhiol by deed passed before J. Poydras, judge of the court of the Parish of Pointe Coupee, July 17, 1806, and that Filhiol never afterwards parted with his title.

Plaintiffs allege that when said deeds were made, the Spanish colonial law forbade any public officer, having authority to receive acknowledgements of and pass deeds for the conveyance of lands, to pass such deeds or to receive acknowledgements thereof, unless they knew that vender had a title to the lands proposed to be sold.

They further say, that, in 1819, the said Filhiol leased the Hot Springs to one Dr. Stephen P. Wilson for five years; that shortly thereafter, in 1821, said Filhiol died, and that, ever since his death, the plaintiffs have always urged their title to the property and employed agents and attorneys to do so for them, but that, during a large part of this time, they have been embarrassed by the want of the original grant, which had, without their knowledge, been in the hands of one Resin P. Bowie, a distinguished lawyer, who made a specialty of Spanish grants, and after whose death, in 1843, the grant was mislaid; that often and repeated searches were made by them, but without success, but that lately, in 1883, the grant was found by Mrs. Matilda E. Moore, of New Orleans Parish, Louisiana, among the effects of her mother, the widow of the said Bowie, and that the grant was, in that year, delivered by Mrs. Moore to Margaret A. Muse, one of the plaintiffs, who is the daughter of the said Bourgeat and Marie Barbe Filhiol and a granddaughter of the grantee. Printed copies of affidavits made by Matilda E. Moore, Ellen M. Coates, Margaret Adelaide Muse, and Hypolite Filhiol, as to the finding and delivery of the grant and Trudeau's certificate, are attached to and filed with the amended complaint.

Plaintiffs state that they claim title to the said league of land as the heirs at law of Filhiol, and that they rely upon the written evidences of their title filed with their complaint.

It is alleged, that the defendant is in the unlawful possession of a part of the land, which part is included in the Hot Springs Mountain reservation, in the city of Hot Springs, county of Garland, and State of Arkansas, the boundary lines of which reservation were established by the Hot Springs commission, by public surveys, in pursuance of the laws of the United States, the lands so unlawfully possessed being described as follows, to wit:

"Commencing at the quarter-section corner between sections thirty-two and thirty-three, in township two south, range nineteen west, of the fifth principal meridian, in the city of Hot Springs, county of Garland, and State of Arkansas, and run thence north seventy-seven degrees and thirty minutes east four hundred and thirty-seven feet to a stone monument known as angle No. 33 of said Hot Springs Mountain reservation; thence along the line of said reservation, between angles 33 and 34 thereof, fifteen feet to the point of beginning; thence south five degrees east three hundred and twenty-two feet; thence north eighty-five degrees east seventy-six feet; thence north five degrees west ninety-nine and eighth-tenths feet; thence north eighty-five degrees east sixty feet; thence north five degrees west fifty-seven feet; thence south eighty-five degrees west seventy-six feet; thence north five degrees west fifteen and eight-tenths feet; thence north eighty-five degrees east twenty-nine feet; thence north five degrees west eighty-seven and eight-tenths feet; thence south eighty-five degrees west thirty feet; thence north five degrees west twenty feet; thence north eighty-five degrees east one hundred and seventy-four and seven-tenths feet; thence north five degrees west fifty-three feet; thence south eighty-five degrees west forty-eight feet; thence north five degrees west eighty feet; thence north

eighty-five degrees east fifty-four feet; thence north five degrees west one hundred feet to a point between angles numbering 33 and 34 of said Hot Springs Mountain reservation three hundred and twenty-nine and seven-tenths feet from said angle No. 33; thence along said reservation line south westward one hundred and thirty-eight and seven-tenths
36 feet; thence south five degrees east one hundred and six feet; thence one hundred and thirty feet south eighty-five degrees west to the point of beginning, all courses being magnetic" (Record, p. 17).

They allege that defendant has been in such possession since the third day of March, 1892, during all which time plaintiffs say that they have had title to and right of possession of said land; and they say that, by reason of such possession, they have been damaged in the sum of twenty thousand dollars.

They pray judgment for the possession of the land so held, and for damages for the unlawful detention.

To this amended complaint the defendant demurred (Record, pp. 9–10, 25). Thereafter, pending the demurrer, it filed its answer (Record, p. 26), and, later, filed an additional exception to the grant from Miro to Filhiol (Record, p. 30).

The grounds of the demurrer were, that the amended complaint did not state facts sufficient to constitute a cause of action, and that, if plaintiffs have any remedy, it must be pursued in equity and not at law.

Afterwards, on June 1, 1895, the court rendered its judgment, sustaining the demurrer and the exceptions to the grant and the survey, being exhibits A and B to the complaint, and dismissing the complaint with costs; to this ruling plaintiffs excepted, and sued out a writ of error with assignment of errors (Record, p. 31).

Argument.

The record contains an assignment of errors setting out separately and particularly each error asserted, but, for the

purposes of the argument, they may be condensed into three propositions.

1. It was error to permit the defendant in error to file exceptions to the exhibits, otherwise than with the answer.

2. It was error to sustain said exceptions, or any of them, pending a demurrer.

3. It was error to sustain the demurrer and give judgment dismissing the action.

The statute of Arkansas regulating the pleadings and practice in actions for the recovery of land was passed March 5, 1875, and is as follows:

"Section 1. That hereafter in all actions for the recovery of lands, except in actions of forcible entry and unlawful detainer, the plaintiff shall set forth in his complaint all deeds and other written evidences of title on which he relies for the maintainance of his suit, and shall file copies of the same *as far as they can be obtained*, as exhibits therewith, and shall state such facts as shall show a *prima facie* title in himself to the land in controversy, and the defendant shall plead in the same manner as above required from the plaintiffs.

"Sec. 2. That the defendant *in his answer* shall set forth exceptions to any of said documentary evidence relied on by the plaintiff to which he may wish to object, which exceptions shall specifically note the objections taken, and the plaintiffs shall in like manner, within three days after the filing of the answer, unless longer time is given by the court, file like exceptions to any documentary evidence exhibited by the defendant, and all such exceptions shall be passed on by the court, and shall be sustained or overruled, as the law may require; and if any exception is sustained to any such evidence the same shall not be used on the trial unless the defect for which the exception is taken shall be covered (cured) by amendment.

"Sec. 3. That all objections not specifically pointed out *in*

the manner provided above shall be waived." Acts of 1874–5, p. 229.

In Fogg *vs.* Martin, 53 Ark., 449, the plaintiff had purchased the land at a sale for taxes, and he set out and exhibited no deed, except the one to himself. A demurrer to the complaint was overruled, and this action was sustained by the Supreme Court of the state. The court said that if the necessary facts are stated in a defective, uncertain manner, objection should be taken by a motion to make more specific, Ball *vs.* Fulton Co., 31 Ark., 379; Bushey *vs.* Reynolds, 31 Ark., 657; Henry *vs.* Blackburn, 32 Ark., 449. These cases show that the code has made no change in the substantial allegations necessary to constitute a cause of action, [31 Ark., 379], but that the common law rule, which construes a pleading adversely to the pleader, is abrogated, [31 Ark., 657]; and the court quoted from 16 Wis., 504, "contrary to the common law rule, every reasonable intendment is to be made in favor of the pleading."

In Surginies *vs.* Paddock, 31 Ark., 657, the court, speaking of the statute of 1875, said: "Under the former practice in ejectment, the parties did not produce or disclose their title deeds until offered in evidence on the trial, and surprises not unfrequently occurred by the production of deeds, etc., not anticipated, and which the party against whom they were produced had no opportunity to examine. One of the objects of the statute was to require the plaintiff, on filing his complaint, and the defendant on interposing his answer, to disclose their respective titles, and exhibit copies for mutual examination, to prevent surprises on the trial, etc." In that case, the written instruments of title upon which the plaintiff relied were not exhibited, and the court said: "The entry and issuance of the certificate of purchase are alleged and the loss or destruction of the certificate averred as an excuse for not filing a copy as an exhibit, which was sufficient under the above act of March 5, 1875;" and in Steward *vs.* Scott, 57 Ark., 153, where the

land was claimed by the heirs of one Drennan, under a deed alleged to have been made to their ancestor by Walker, who had entered it in the land office in 1838, the court said, "They aver that Drennan's deed from Walker was recorded in Crawford county where the land is situated; that it has been lost, and that the records have been destroyed by fire; that the certificate of entry, if ever in Drennan's possession, has been lost, etc." It is clear from the language of the statute itself, and the decisions of the courts, that the plaintiff is required simply to set forth and exhibit all deeds and other *written* evidences of title on which he relies, and that, if any part of such written evidence has been lost or destroyed, and, consequently, cannot be obtained, an allegation of that fact has the same effect as if it were produced, without averring what efforts have been made to discover it. He is not required to set out any part of the oral testimony upon which he expects to rely, but only to give his adversary notice of documentary evidence; and his pleading cannot be successfully assailed by a demurrer, on the ground that it does not state the oral testimony which will be introduced to make either the lost documents, or the exhibited documents, admissible on the trial. The deeds or other evidences of title which the act requires the plaintiff to exhibit with his complaint do not constitute any part of the pleadings, and are not evidence, unless introduced and read on the trial. Richardson *vs.* Williams, 37 Ark., 452; Jacks *vs.* Chappin, 34 Ark., 554. A demurrer to the complaint, therefore, does not extend to them, and, if the allegation in the pleading, without the exhibits, are sufficient to show a *prima facie* cause of action, the judgment of the court below was erroreous.

The plaintiff having complied with the statute, by filing the deeds and other written evidences, "as far as they can be obtained," the law provides in the most explicit terms how they shall be assailed by the opposing party. If the deeds or other written evidences are filed by the plaintiff, "the defendant *in his answer* shall set forth exceptions to any of such

documentary evidence relied on by the plaintiff to which he may wish to object, which exceptions shall specifically note the objections taken;" and "all objections not specifically pointed out *in the manner provided above* shall be waived." If any practical effect is to be given to these plain statutory provisions, the so called exceptions filed on the 5th of November, 1894, could not properly be considered by the court, and its judgment sustaining them was clearly erroneous. Exceptions to the documentary evidence can not be used to support a demurrer, which necessarily admits all the material facts that are well pleaded. When the plaintiff has given notice of and filed, or accounted for, the written evidence upon which he expects to rely on the trial, and has stated "such facts as shall show a *prima facie* title in himself," the defendant can not admit the facts and at the same time dispute the evidence which his adversary proposes to introduce to prove them. If such a practice should be sanctioned, the result would be, that in all actions for the recovery of land, the plaintiff would be summarily driven out of court, without a trial, simply because he had failed to state all his evidence, written and oral, in his complaint. Many of the exceptions in the present case, although tried and decided in connection with a demurrer, are predicated upon a negation of material allegations expressly made in the complaint, and upon palpable misconceptions of the contents of the written documents themselves, and the official certificates attached to them. They were prematurely filed, improperly considered, and erroneously decided, and the very least this court can do is to ignore them entirely, and dispose of the case upon the demurrer alone, according to the well settled rules of law.

In order to simplify the question and avoid, as far as possible, the wide range of discussion indulged in by the counsel for the defendant in error in the court below, and by the court in its opinion, it may be well to state, as succintly as possible, what facts are admitted by the demurrer. They are:

1. The citizenship of the plaintiffs in error, and that they are the only heirs at law of Don Juan Filhiol, deceased.

2. That in the year 1783, their ancestor was appointed by the King of Spain captain in the army and commandant of the militia and assigned to duty at the post of Ouachita, Louisiana (Record, p. 11).

3. That Don Estevan Miro was the governor-general of the province of Louisiana, and that, on the 12th day of December, 1787, the said Filhiol memorialized said governor for a grant of land, upon which a survey of the land applied for was ordered (Record, p. 11).

4. That after that date, and before the 22d day of February, 1788, Don Carlos Trudeau, who was then surveyor general of the province, made a survey of the land applied for and made a report thereof, with a figurative plan and procès verbal in due form, in and by which the land was described as follows: "A tract of land with a front of eighty-four arpents and a depth of forty-two arpents on each side of the stream called 'La Source d'eau Chaude,' about two leagues distant from its entrance into the Ouachita, having the Hot Springs for its center, its limits extending in parallel lines east and west to its full depth and bounded on both sides by lands belonging to the Crown" (Record, p. 11).

5. That "said survey, figurative plan and procès verbal have been lost or destroyed and cannot be produced by plaintiffs" (Record, p. 11).

6. That on February 22, 1788, Don Estevan Miro, as governor of the province, made and delivered to the said Filhiol the paper of that date, which is exhibited, and which is claimed to be a grant of the land described in the complaint; that is, the official execution and delivery of the paper at that date, and its contents, are admitted; but, whether it does or does not, together with the lost survey, plan and procès verbal, constitute a valid grant of the land sued for, or of any land, is a question open to argument on the demurrer (Record, p. 11).

7. That said paper was executed and delivered to Filhiol while he was acting as commandant of the post of Ouachita, and as a reward for civil and military services (Record, p. 11).

8. That Don Estevan Miro, in his capacity as governor-general of the province, was, by the Spanish colonial laws, invested with power to make grants of land and convey the absolute fee simple (Record, pp. 11–12).

9. That after the execution and delivery of the grant, or paper relied on as a grant, to wit, on the 6th day of December, 1788, Carlos Trudeau, who was then land and particular surveyor of the province, made and delivered to Filhiol a certificate, which is exhibited; but the legal effect of that certificate is open to argument on the demurrer (Record, pp. 12–13).

10. That on the 28th day of November, 1803, the said Filhiol sold and conveyed, or passed the title, to the land described to his son-in-law, Narcisso Bourgeat, before Don Vinciente Fejerio (or Fejevio), lieutenant of the regiment of infantry of Louisiana and military and civil commandant of the district and jurisdiction of Ouachita, and witnessed by Senor Baron de Bastrop and Don Jose Pomet, who signed the act in the presence of Don Alex. Breard and Don Carlos Bettin, all whom were principal men of Ouachita at that date; that is, it is admitted that this act was done at the time and in the manner stated in the complaint, and that the paper exhibited is genuine; but its meaning and legal effect are open to argument on the demurrer (Record, pp. 13–14).

11. That this deed, or act, was immediately reported to the proper office in the province of Louisiana and was recorded, and that the paper exhibited is a correct copy from that record (Record, p. 14).

12. That on the 17th day of July, 1806, the said Bourgeat reconveyed the said land to Don Juan Filhiol by a deed which was passed before J. Poydras, judge of the Parish of Pointe Coupee, and that this deed was recorded in the office of the Recorder of said Parish on the day of its execution, and that

the paper exhibited is a correct copy from that record (Record, p. 15).

13. That at the time of the execution of said conveyances the Spanish law forbade any public officer, having authority to receive acknowledgements of, or to pass deeds for the conveyance of lands, to pass such deeds or receive acknowledgements thereof, unless he knew that the vendor had title to the land (Record, pp. 15–16).

14. That in the year 1819, Don Juan Filhiol leased said Hot Springs to one Dr. Stephen P. Wilson, for a term of five years, and that Filhiol died in 1821, and his heirs have claimed the title to the land ever since that time (Record, p. 16).

15. That the grant was lost for many years, having, without the knowledge of the plaintiffs in error, been placed in the hands of R. P. Bowie, who died in 1843, and that it was discovered by his widow in 1883, and delivered to one of the plaintiffs in error (Record, p. 16).

16. That the defendant was, at the institution of this action, in possession of a part of the land, the part so possessed being fully described in the complaint, and that it had held the same since March 3, 1892.

The answer filed by the defendant in error, while the demurrer was pending, cannot in any manner affect the questions presented by the demurrer itself; or, in other words, the demurrer must be considered separately from the answer. Greenfield *vs.* Carlton, 30 Ark., 547; Gantts Dig., 4588.

We insist that the admitted allegations of the complaint show, that at the time of the transfer of the province of Louisiana from France to the United States, on the 20th day of December, 1803, in pursuance of the provisions of the treaty between the two counties, concluded on the 30th day of April, 1803, Narcisso Bourgeat had, under the Spanish laws, regulations and customs relating to grants and conveyances of land in said province, a complete and perfect title to the square

league of land including the Hot Springs, and that his title passed to Don Juan Filhiol by the deed dated July 17, 1806. Every essential fact necessary to constitute a valid grant of land under the Spanish laws in force in the province at the time the grant relied on was executed and delivered, is distinctly alleged and admitted, as will be shown by a review of the laws and regulations applicable to the case; and the court must take judicial notice of these laws and regulations, as was decided in United States *vs.* Turner, 52 U. S., 663.

On the 31st day of July, 1786, the King of Spain appointed and commissioned Don Estevan Miro to be "the political and military governor of the city of New Orleans, and the province of Louisiana," conferring upon him all the honors, favors, rights, privileges and immunities, without exception, attached to that office. See 2 White's New Compilation, 444. The regulations then in force were established by Governor O'Rielly, with the royal consent, on the 18th day of February, 1770, and they remained in force, so far as they affected the validity of the grant in this case, until superseded by the regulations of Morales, which were promulgated on the 17th day of July, 1799. The twelfth article of the O'Rielly regulations provided, that—

"All grants shall be made in the name of the king, by the governor-general of the province, who will, at the same time, appoint a surveyor to fix the bounds thereof, both in front and depth, in presence of the judge or notary of the district, and of two adjoining settlers, who shall be present at the survey. The above mentioned four persons shall sign the verbal process which shall be made thereof, and the surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government, and cabildo, another shall be delivered to the governor-general, and the third to the proprietor, to be annexed to the titles of his grant." 2 White's New Recop., 230, 231; 5 Am. State Papers, Lowrie Ed., 289, 290.

It will be observed that this regulation contains no provision requiring the grant, or any papers connected with the grant, to be recorded in any public office or elsewhere; such a requirement was made, for the first time, in the regulations promulgated by Morales in 1799, long after the grant to Filhiol, and, consequently, all that was said on this subject by counsel for the defendant in error, in the court below, and by the court in its opinion, was wholly inapplicable to the case under consideration. In fact, the counsel and the court, in the discussion of this case, have confounded the regulations of O'Rielly with the regulations of Morales and with the laws and regulations of Mexico, in the most bewildering manner, and have attempted to apply, as conclusive of the questions involved, judicial decisions made upon grants issued under laws entirely different from the rules governing this one. Nor do the regulations of O'Rielly require the grantee to be put in actual possession of the land by any formal act, in order to complete his grant, as was erroneously assumed to be the case by the court below. They do not even require the grant to be preceded by a memorial or *requete*, although that seems to have been the customary mode of making an application, and it was the mode adopted in this instance. But the *requete*, not being required by the laws or regulations, if actually made, constitutes no part of the evidence of title and need not be pleaded or preserved, or accounted for.

The governors general of the Spanish provinces possessed very great powers in relation to the disposal of the crown lands, and it is probable that a too liberal exercise of their authority to make grants as rewards for public services and upon other considerations, was one reason why it was taken away from them and conferred upon the general intendant by the royal order of October 22, 1798, and the Morales regulations in 1799. See 2, White's Compilation, 238, 245. Their grants of the public lands appear to have been practically final and conclusive in all cases. White, who was appointed

by President Adams in 1828, at the instance of Attorney-General Wirt, to make a complete translated collection of all the French and Spanish ordinances affecting land titles in the territories ceded to the United States, says in his official report to the Secretary of State, "I sought assiduously, but have been unable to discover a record or notice of the proceedings upon some" [any] "grant or concession which has been made by a captain-general, intendant, or governor, and disapproved of by the king. I have been unable to ascertain whether any such exist." It may reasonably be assumed that, if his researches failed to discover such a case, it was because none such existed, the king having always acquiesced in and respected the grants made by the captains-general, intendants and governors of his provinces, in the Indies.

In Solorzano's *Politica Indiana*, a work of the highest authority on the laws and customs prevailing in the Indies under the dominion of Spain, the powers of viceroys, captains-general and governors are examined and stated with great care, as will be seen from the following extracts:

"Because, as Carolo Pascalio says, and Calisto Ramirez, subjects have no obligation to investigate or know the orders and instructions of a secret nature which are given to the viceroys, in which bounds are put to their power, for, if they do not obey them, they are subject to reprehension or punishment; but what they may perform must be sustained, because they are in quality of factors or substitutes to royalty, for whose actions he who named them is accountable, and put them in that charge which is indeed conformable to right."

Book 3—Chapter 5—Article 31.

"But although this, as I said, proceeds with reference to common law, and it is fit that the viceroys and governors of the Indies never cease to bear it in mind, still, as regards the municipal duty of these, the whole, or almost the whole, is left

to their discretion and prudence; because in the conflict or concurrence of these *cedulas* (royal provisions) and orders *de providende*, they have not to attend so much to the dates and orders of these as to that which may appear for them most convenient to execute: as also, what the merits and services of those who have presented them ask and require, and the state of things in their countries or provinces, the government of which is committed to them."

Book 3—Chapter 9—Article 14.

"This calls us to another question not less frequent and difficult, upon which I have seen some suits adjourned from a discord of opinion—I mean who is to have the preference of two, of whom one obtained by favor from the court a special *encomiẽnda* (Indian tribute) by dispensation made to him by His Majesty; and another obtained the same in the Indies by grant of the viceroys or governors, having there power to do it, without having notice of the other from His Majesty.

"I judge we can examine and easily solve this question as respects the right, only by informing ourselves and looking attentively as to the fact of which of these grants of the same objects preceded the other; for, if we suppose the vacancy to happen in the Indies, and the viceroy or governor, who *there is, as the king himself*, made the appointment lawfully and immediately, and in exercise and use of his faculties, gave the title and possession thereof to some well deserving person, we must come to the resolution that the grant of this same encomienda, which afterwards may be found to be made by the king in his court, is of itself null and of no value or effect, because there is no vacancy to supply, as we said in chapter five, on account of its being previously occupied, and the grant made in proper time; and the concession made in the name of the king, in virtue of authority sufficient and his own commission, must be, and must remain always firm and valid as if himself had made it. Of this we have an express text in speaking

about what is done by the procurators of Cæsar (l. 1. de off. Proc. Cæsar) and others, still more expressive, which decide upon what we are saying upon the subject of gifts."

Book 3—Chapter 10—Article 25.

"And truly, the provinces of the Indies being, as they are, so distant from those of Spain, it became necessary that in these, more than any other, our powerful kings should place these images of their own, who should represent them to the life, and efficaciously, and should maintain in peace and tranquility the new colonists of their colonies, and should keep them in check, and in proper bounds, by such a dignity and authority as the Romans did when they spread theirs over the best part of the globe, dividing the most remote into two kinds, which they called *consular* and *pretorean*—the emperors themselves taking the government of the principal of these in their own hands, and charging the senate with the second; and giving to those who went to govern the first, the name of proconsuls, and to the others that of presidents—about which we have entire chapters in law, where the commulators speak of this more entensively, and an infinity of authors."

Book 5—Chapter 12—Article 4.

"Article 10. From which it happens that, regularly, in the provinces which are entrusted to them, and in every case, and in all things which are not especially excepted, they possess and exercise the same power, authority, and jurisdiction, with the king who names them."

Book 5—Chapter 12.

"The first established rule and sentence is, that viceroys can act and dispatch in the provinces of their government, in cases which have not been especially excepted, all that the prince who named them might or could do if he were himself present, and for this reason and cause his jurisdiction and power must be held and judged more as a thing established than delegated."

Book 5—Chapter 13—Page 376—Article 2.

"Article 4. In particular passages relating to viceroys of the Indies, we have an infinite number of cédulas which decide this and assert the same, which can be seen in the first volume of those in print from page 237, and, besides these another still of a prior date, given at St. Lorenzo, 19th of July, 1614, which orders, generally, 'that the viceroys, as holding the place of the king, can act and decree in the same manner, as the royal person, and must be obeyed as one holding his authority, without replying, without interpretation, under the penalties to which are subjected those who do not obey the royal commands, and such laws as may be imposed by them; and that which they ordain and command, the king will hold as firm and valid.' "

"Article 5. All which is certain, and in such manner that, even when they exceed their powers or secret instructions, they must be obeyed like the king himself, although they may transgress, and are afterwards punished for it, as I have already said in other chapters; and Mastrillo expresses it at some length in speaking of the practice of these secret instructions, and the form which must be observed in them. And the reason of this is, because we must almost (always) presume in favor of the viceroys; and what they do we must consider as done by the king who appointed them, as is said in many texts, and by several authors."

In the case of United States *vs.* Arredondo, 31 U. S., 691, this court said: "The laws of an absolute monarchy are not legislative acts—they are the will and pleasure of the monarch, expressed in various ways; if expressed in any, it is a law; there is no other law making, law repealing power—call it whatever name, a royal order, an ordinance a *cedula*, a decree of council, *or an act of an authorized officer*, if made or promulgated by the king, by his assent or authority, it becomes as to the person or subject matter to which it relates, a law of the kingdom. It is emphatically so in Spain and all its

domains."—page 718. "A royal order, emanating from the king, is a supreme law, superseding and repealing all other preceding ones inconsistent with it."—*Ibid.* Speaking of the policy of the United States in relation to the recognition of these grants, as declared by the action of Congress, the court said: "They have adopted as the basis of all their acts, the principle that the law of the province in which the land is situated is the law which gives efficacy to the grant, and by which it is to be tested, whether it was property at the time the treaties took effect. The United States seem never to have claimed any part of what could be shown by legal evidence and local law to have been severed from the royal domain, before their right attached."—page 717.

When a grant purports, to have emanated under all the official forms and sanctions of the local government, it must be respected; or, as the court said in the case cited, "That is deemed evidence of their having been issued by lawful, proper and legitimate authority, when unimpeached by proof to the contrary."—page 722. The grant, legally and fully executed, was competent evidence of the matters *set forth in it*, and as none other was necessary, it was in effect conclusive."—page 723. And again, "That every prerequisite has been performed, is an inference properly deducible, and which every man has a right to draw, from the existence of the grant itself."—page 729.

In the same case, and on the precise point now under consideration, the court laid down the following rules or principles, which, so far as we are aware, have been adhered to ever since. "A public grant, or one made in the name and assumed authority of the sovereign power of the country, has never been considered as a special verdict, capable of being aided by no inference of the existence of other facts than those expressly found or apparent by necessary implications; an objection to its admission in evidence on a trial at law, or a hearing in equity, is in the nature of a demurrer to evidence,

on the ground of its not conducing to prove the matter in issue. If admitted, the court, jury, or chancellor must receive it as evidence *both of the facts it recites and declares, leading to and the foundation of the grant*, and all other facts legally inferrible by either, from what is so apparent on its face."—page 728. "If any jurisdiction is given, and not limited, all acts done in its exercise are legal and valid, if there is a discretion conferred, its abuse is a matter between the governor and his government."—*Ibid.* The court cited the case of King *vs.* Picton, Gov. of Trinidad, 30 St. Tr. 869, and then says: "The only questions which can rise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, the power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive (1 Cranch, 170–1), legislative (4 Wheat, 423; 2 Pet., 412; 4 *Ibid*, 563), or special (20 Johns., 739; 2 Dow. P. C., 521) unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."—page 729. See also Patterson *vs.* Jenks, 28 U. S., 216.

In United States *vs.* Clark, 33 U. S., 436, the land was situated in East Florida, and the grant referred to the royal order of October, 1790, issued by the Captain-General of Cuba, but the court held that it was not issued under that order, but was made in consideration of services. Chief Justice Marshall, who delivered the opinion of the court, examined at considerable length the source and nature of the power of the governors of Spanish provinces in the Indies, to make grants of land in remuneration for public services, and their right to do so at their own discretion was distinctly recognized. Among other things he said: "A grant made by a governor, if authorized to grant lands in his province, is *prima facie* evidence that his power is not exceeded. The connection between the crown and the governor, justifies the presumption that he acts according to his order * * * Such a grant under a general

power, would be considered as valid, even if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, so far as we may reason on general principles, that in a Spanish tribunal, a grant having all the forms and sanctions required by law, not actually annulled, by superior authority, would be received as evidence."—page 451. "He who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes upon himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud."—page 452.

In the same case, the chief justice, speaking of the regulations of O'Rielly, which were not abrogated as to East Florida by the Morales ordinances of 1799, said: "This is most clearly the language of a man who supposes himself to possess full power over the subject. The rules he prescribes for himself, do not purport to be limits imposed by a master, but to be marked out by his own discretion, and to be alterable at will. He makes no allusion to orders emanating from his sovereign, marking out the narrow path he is bound to tread; but gives the law himself, in the character of a man invested with full powers."—page 454.

In the case of Strother *vs.* Lucas, 37 U. S., 410, the court discussed the authority of Spanish governors to make grants of land in the provinces, and said: "Where the act is done contrary to the written order of the King, produced at the trial, without explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein, and according to some order known to the King and his officers, though not to his subjects."—page 437 This general and comprehensive power belonged, not only to the particular governor who made the regulations, but to his successors as well. In Delassus *vs.* United States, 34 U. S., 117, it was said: "The regulations of Governor O'Rielly were intended for the general government of subordinate officers, and not to

control and limit the power of the person from whose will they emanated. The Baron Carondelet must be supposed to have had all the powers which had been vested in Don O'Reilly." See also, Smith *vs.* United States, 29 U. S., 511.

These citations and quotations are made for the purpose of showing:

1. That the Spanish governors in the province of Louisiana were invested with full power and authority to make grants of land within the limits of their jurisdiction, and that, in the execution of this power, they were not absolutely bound by the terms of the regulations made by themselves or their predecessors, and

2. That a public grant of land by one of these officials, not only passed the title, if it purported to pass it, and there was a sufficient description of the land to identify it, but, if not impeached for fraud, is evidence of the facts recited in it "leading to and the foundation of the grant." 31 U. S., 728.

It is too well settled to require discussion, that recitals in a deed or grant are binding on parties and privies. Shelby *vs.* Wright, Willes, 9; Crane *vs.* Morris, 31 U. S., 598; Carver *vs.* Jackson, 29 U. S., 1; Carsens *vs.* Carsens, Willes, 25. While recitals do not generally bind strangers to the deed or grant, or those who claim by title paramount to it, or by title from the same party anterior to the date of the reciting deed or grant, they may be used, even against strangers, as secondary evidence, to prove the contents of a recited paper, which is shown to have existed and to have been lost. 4 Greene (Iowa), 364; Carver *vs.* Jackson, *supra*; Ford *vs.* Gray, 1 Salk., 285. In Glenn *vs.* United States, 54 U. S., 250, the court held that "the petition and the paper signed by Delassus (commandant) must be taken together" and "whatever is stated in either as to facts or intent must be taken as true." In that case, where the concession was made by Delassus, a commandant, acting as

a sub-delegate of the governor, and having no authority to make grants except such as his superior had conferred upon him, the court said that, "taking the facts stated in the memorial and in Delassus' decree thereon to be true (as we are compelled to do) it is sufficiently manifest, as we think, that the commandant did stipulate with Clamorgan in accordance with the governor-general's instructions;" and, notwithstanding the positive limitations imposed upon the officials by the Mexican law and regulations, this court said in Hornsby *vs.* United States, 77 U. S., 224: "The grant recites that the necessary steps were taken and something more than mere surmises, at this day, are necessary to show that the recital is false."

In United States *vs.* Johnson, 68 U. S., 326, the record failed to show that the required preliminary proceedings had been taken, but the grant recited that "the necessary steps and investigations were previously taken and made in conformity with the requirements of law and regulations," without stating what steps were actually taken, and this court accepted the recital as evidence of a compliance with the laws and regulations.

The United States, having assumed the position and obligations of Spain in reference to all grants made prior to the cession, and having solemnly agreed, by treaty, to protect the rights of property derived from them, cannot be considered strangers to the grant in controversy in this case; and this court knows judicially, from the public laws of the country, that the Hot Springs reservation, in which the land sued for is located, has been surveyed as public land and is held by the United States. The act of April 20, 1832, sets apart four sections of land, including the Hot Springs, as a public reservation, and many other public statutes, have been passed by Congress on the same subject. But, even if this were not sufficient to justify a reliance upon the recitals in this grant as evidence of the facts stated, the character of the grant itself and the public sanction

given to it, if it is a valid grant, by the stipulations of the treaty with Spain, and by the rules of international law, make its recitals binding, not only upon the United States as a government, but upon all their citizens. It is a public grant, made by a public official having general authority to grant lands; if valid, it is recognized and protected by a treaty; its validity can be assailed only by impeaching the authority of the official to make this particular grant, or by alleging and proving fraud, and the latter can not be done on a demurrer. Neither the United States nor any of their citizens can defeat the title claimed under this grant, if it is valid, or question the *prima facie* effect of the recitals contained in it, without establishing, or, at least, alleging, a better title to the same land derived from Spain, or France, or some other government possessing sovereign power over the territory, prior to the date of the cession. According to all authorities, the same rules of evidence apply in the case of a Spanish grant protected by a treaty with this country as in the case of a grant of public lands made by our own authorized public officials, and everybody is bound by the recitals contained in it. If a valid grant was made by Spain before the cession of the territory, it became, by the terms of the treaty, as well as by the rules of international law, to all intents and purposes, the same as a grant made by the United States; because the United States, upon a full consideration, guaranteed it, thereby becoming legally a party to it.

The only question to be determined is, whether the grant in controversy was binding on the King of Spain, according to the laws and usages of that country at the time of the re-cession of Louisiana to France by the secret treaty of St. Ildefonso, October 1st. 1800, and at the time of the treaty of April 30th, 1803, by which the province was ceded by France to the United States; for, if it was binding upon Spain, it is equally binding upon the United States, not only by the law of nations, but by the express provisions of the third article of the treaty with France. Strother *vs* Lucas, 37 U. S., 410; Dent *vs*. Emmeger,

81 U. S., 312; United States *vs.* Percheman, 32 U. S., 51. As was said by this court in United States *vs.* Arredondo, 31 U. S., 691, a title acquired from the former government of a ceded territory, "is as much protected by the laws of a republic as the ordinances of a monarchy."

The grant, as translated and used in the court below, refers to "anterior surveys" made by the surveyor of the province, Don Carlos Trudeau, speaks, in the present-perfect tense, of the "possession given to Don Juan Filhiol," designates him as commandant of the post of Ouachita, states that the tract of one square league of land is situated at about two leagues and a half distance from said river Ouachita, "and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides *expressed* by the figurative plan and certificate of said surveyor Trudeau above named, and recognizing this mode of measurement, we approve *those surveys*, using the faculty which the king has vested in us, and assign in his royal name unto the said Juan Filhiol the said league of land in order that *he may dispose of the same and of the usufruct thereof as his own*." This is not a mere concession, or order for a survey, in compliance with a memorial or *requete*, such as this court was called upon to consider in many of the cases cited on the other side, but it is an absolute grant *in presenti*, founded on surveys previously made, which were produced, examined and approved. A *requete* was a petition presented by the applicant for a grant, expressed in his own language; it did not purport to emanate from the official having authority to make the grant, but was addressed to him, and, if he acceded to the request, he did not usually make a grant of the lands at once, but made a concession, or grant of the request, and ordered a survey to be made by a designated person, and, when that was made and returned, he executed and delivered the final grant, or a "complete title;" but these words, in the Spanish law, refer only to the instruments or papers which ordinarily constitute the evidence

of title, and not to the estate or interest conveyed by them. De Haro *vs.* United States, 72 U. S., 599; Slidell *vs.* Grandjean, 111 U. S., 416.

According to the admitted allegations of the complaint, all these preliminary steps had been regularly taken before the 22nd day of February, 1788, when the final grant, or complete title, was made in this case. The grant, itself refers to "anterior surveys," and, also, to a "figurative plan," that is, a plan showing the form or figure of the land granted, which it states was made by Trudeau. It is alleged in the complaint and admitted by the demurrer, that Filhiol presented a memorial or *requete* to the governor on the 12th day of December, 1787, for a grant of this tract of land; that a survey of the land was ordered; that after the 22nd day of December, 1787, and before the making of the final grant on the 22nd day of February, 1788, Don Carlos Trudeau, who was then the surveyer-general of the province, made a survey of the land applied for and made a report, with a plan and procès verbal, particularly describing the land as set out in the complaint. Thus, every requirement of the Spanish laws, regulations and customs then in force in relation to the granting of crown lands in the province of Louisiana was strictly complied with. By the survey and description, the land was plainly segregated from the public domain, and the survey gave Filhiol juridical possession according to the Spanish law, without the formality of livery of seizin at common law, or any other act equivalent to it, as will be seen from all the decisions cited.

The grant was not required to be deposited or recorded in any public office, and it comes from the proper custody —the legal heirs of the grantee. There is nothing suspicious about it or about any of the other papers exhibited; but, even if they were claimed to be forgeries, the question could not be tried on demurrer. There was nothing unusual in the proceedings relating to the grant, from the time the petition was presented until the complete title was issued.

First, there was the *requete* accompanied by the usual plan, showing the location of the land applied for; secondly, a concession, with an order for a survey to put the grantee in possession, with a defined boundary; thirdly, the actual survey on the ground; and, fourthly, the approval of the survey by the governor and the execution and delivery of the final grant. See United States *vs.* Castant, 53 U. S , 440.

This was the customary mode of proceeding to secure a title to the public lands in the province of Louisiana, but all these steps were not absolutely necessary, especially in the cases of grants for public services, nor was it necessary that they should be taken in the precise order here stated If a survey had been made on the ground before a *requete* was presented and was approved by the governor and a grant made *in presenti* for the land described in the survey, can it be doubted that a perfect title would pass? On the other hand, if an absolute grant *in presenti* was made in the first instance, without a *requete* or survey, but a survey was ordered and afterwards made on the ground, so as to identify the land, can it be doubted that a perfect title would pass, without the execution of another grant? See United States *vs.* Hughes, 54 U. S., 2; U. S. *vs.* Castant, 53 U. S., 437. The governor, having undisputed power to grant lands, could act whenever he chose and upon any motive or information that was satisfactory to himself, and his grant would be valid if the land was identified and segregated from the public domain, either by a survey, whenever made, or by putting the grantee in possession in some other mode. The grant need not even be in writing, for there was nothing in the civil law of Spain, or in the regulations promulgated in the province of Louisiana, making any difference in this respect between the transfer of real property and the transfer of goods and chattels. See Sanchez *vs.* Gonzales, 11 Mart., 207; Le Blanc *vs.* Martin, 3 La , 47; Landey *vs.* Martin, 13 La., 1.

In United States *vs.* Castant, cited above, the course usually adopted in making grants of the crown lands in the province

of Louisiana was not followed; there was no *requete*, and no survey was ever ordered, except orally, but one was made by Pintado, a deputy surveyor, and, afterwards, Don Carlos Laveau Trudeau, without any order from the governor, except an oral one, made a certificate, stating that he had delivered possession of the land to Donna Maria Manetta Trudeau whereupon the governor "recognizing" the survey and certificate, and "approving them," made the grant; and this court said that "the effect of these proceedings on the part of the Spanish governor was to vest in the grantee a perfect legal estate in the subject granted, the *titulo in forma*." Many other cases, decided by this court, might be cited to show that there was no fixed and unalterable order of proceeding required as a condition to the validity of the grant, but, as it is admitted that all the preliminary steps were, in fact, taken, in the usual and regular order, in the present case, it is unnecessary to extend the argument upon this point.

But it is argued that the paper signed and delivered by Governor Miro on the 22d of February, 1788, was not, in fact, and was not intended to be, a final grant of the land; that the language employed in it shows that a further survey or measurement was required; and that, therefore, if a further survey or measurement was not made, no title vested. The conclusive answer to this is, that it is admitted on the record that when the memorial asking for a grant of this tract of land was presented to Governor Miro by Filhiol on the 12th day of December, 1787, a survey was ordered, and that it was afterwards surveyed by Trudeau, then surveyor-general of the province; that this survey, with a figurative plan and procès verbal, describing the land, was reported; and that on the 22d day of February, 1788, after this survey and report, the governor executed and delivered the grant. This being true, it would require the most unequivocal expression in the grant to satisfy a court that an additional and wholly unnecessary survey was required by the governor.

If the language employed in one part of an instrument is obscure and ambigious and expresses the meaning imperfectly, resort must be had, in the first instance, to other parts of the same instrument, and to the other documents connected with it, and relating to the same subject, and then, if necessary, to extraneous facts and circumstances to ascertain the real intention of the party or parties; and this rule of interpretation, it seems to us, is especially applicable in the case of documents originally written in a foreign language and afterwards translated into ours. Considering the paper in controversy in its entirety, it clearly discloses a purpose to make a final grant of the title *in presenti*, without conditions of any kind, and without any further act upon the part of either the grantor or grantee; for, after speaking of the anterior surveys and certificate made by the official surveyor, Trudeau, of the possession given to Filhiol, and referring to and approving the figurative plan and measurement, it assigns to the grantee, in the name of the king, the league of land, "in order that he may dispose of the same and the usufruct thereof as his own." These granting words are almost precisely the same used in the United States *vs.* Castant, which were "and recognizing the same" (the survey, etc.), "approving them, as we do approve them, etc., we grant in his royal name the lands, etc., that she may use and dispose of them as her own property, in conformity with the aforesaid acts."

It would be an unusual and forced construction of the instrument to hold that, although reciting the past performance of all the acts required by the laws, regulations and usages of the province in such cases, and actually granting the land *in presenti*, in the name of the king, the words "and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters," mean that an additional survey, plan, procès verbal and a further grant were required in order to

vest a perfect title. If such had been the intention, it would undoubtedly have been expressed in direct terms, and a surveyor would have been appointed, or designated, to make the survey and measurement and "fix the bounds," as was plainly required by the regulations of O'Reilly, and by usage, in all cases where a further grant was to be made in order to complete the title. In United States *vs.* Boisdoré, 52 U. S., 62, we have the case of a concession made by the same governor, Miro, with an order of survey directed to the same surveyor, Trudeau, which clearly illustrates the mode of proceeding when a further grant was to be made. The *requete* and concession will be found on pages 64–5, and the order of survey directs Don Carlos Laveau Trudeau to "establish Louis Boisdorè upon the extent of land which he solicits in the preceding memorial, situated in the section of country commonly called Achoucoupoulous, taking as the point from the plantation of Phillip Soucier, a resident of the said section of the country, to the Bayou called the Bayou of the village of Maringonius, with a depth unto Pearl river, it being vacant, and causing no prejudice to the neighboring inhabitants, as well in front as in depth, which proceedings he will reduce to writing, signing with the aforesaid parties, and will remit the same to me, in order that I may furnish the party interested with a corresponding title in due form." In Robinson *vs.* Minor, 51 U. S., 627, the petition, or *requete*, asked the governor, Corondolet, "to give order to the surveyor-general of this district to extend the boundaries of the said land, to increase it to contain one thousand arpents," whereupon the governor issued the following order to Carlos Trudeau, the surveyor: "Granted.—The surveyor having to designate the limits in the notes of survey, which shall be exhibited to me, so that a title in a due form may be extended to the party." See also Chouteau *vs.* United States, 34 U. S., 137; Mackey *vs.* United States, 35 U. S., 340; Smith *vs.* United States, 35 U. S., 326; United States *vs.* Porchè, 53 U. S., 427; United States *vs.* Simon, 53

U. S., 433; United States *vs.* Reynes, 50 U. S., 127; La Roche *vs.* Lessee of Jones, 50 U. S., 155; Doe *vs.* Eslava, 50 U. S, 421; Soulard *vs.* United States, 29 U. S., 511; Soulard *vs.* United States, 35 U. S., 100. In many of these cases Miro was the governor who made the orders of survey, and the subsequent grants, and Trudeau made the surveys. Provisions similar to those shown in those cases, or of like import, would have been contained in the grant in the present case if it had been intended to furnish "a corresponding title in due form" after the 22d day of February, 1788.

Unless we are mistaken in the foregoing contention, the only office of the words "and understanding (or knowing '*entendido*') that this land is to be measured so as to include the site or locality known by the name of Hot Waters, etc.," in connection with the statement that it was so "expressed," or set forth in the figurative plan and certificate of Trudeau, was to re-affirm and emphasize the intention of the grantor to invest the grantee with the title to that particular and most valuable part of the land. It was a precautionary, and not an essential or operative, clause in the grant; it directed nothing to be done, nor did it increase or diminish the estate granted, but was simply an additional statement, inserted for the more certain identification of the land described in the plan and certificate, which had been presented to the governor, and to which reference was made in the grant. The words used do not constitute an order or command, and to give them any other force or meaning than we have stated would make them inconsistent with all that precedes and follows them in the same instrument, a result which, according to every sound rule of interpretation, must be avoided if possible.

So far, our discussion of this question has been based on the English version of the grant used in the court below, but the original paper, in the Spanish language, was before that court, and is also here for the inspection and interpretation of this court; and the court will examine it and ascertain for itself

what its true meaning and legal effect are. In L'Fitt *vs.* L'Hatt, 1 P. Williams, 526, the will in controversy was written in the French language, and a translation, which was claimed to be erroneous, was used in the ecclesiastical court. The Master of the Rolls said: "Nothing but the original is part of the petition, neither hath the spiritual court power to make any translation; and supposing the original will was in Latin (as was formerly very usual), and there should happen to be a plain mistake in the translation of the Latin into English, surely the court might determine according to what the translation ought to be. And it was done in this case." See also Denise *vs.* Ruggles, 57 U. S., 242; De Haro, 72 U. S. 599.

At the beginning of the grant in this case the words are, "Vistas las antecedentes diligencias practicadas por el Agrimensor de esta Provincia Don Carlos Trudeau sobre la posecion *que ha dado* al S'or Don Juan Filhiol, Commandante, etc.," and the correct translation is, "Having examined the proceedings had (or acts done) by the surveyor of this province, Don Carlos Trudeau, concerning the possession *which he has given* (*que ha dado*) to Senor Don Juan Filhiol, commandant, etc." In the translation to which we have referred in the preceding parts of this argument, three Spanish words, "*que ha dado*," are represented by the single word "given," but whether this is really an error of the translator or an omission in transcribing or printing the document, we have no means of knowing. The grant in the case of the United States *vs.* Castant, to which we have so frequently referred, and which was held to vest a perfect title, began with exactly the same language as the one now before the court, "Vistas las antecedentes diligencias practicadas por el Agrimensor de esta provincia Don Carlos Trudeau sobre la posecion *que ha dado* á Da. Maria Manetta Laveau Trudeau, etc.," and it was translated, "Considering the preceding acts had by the surveyor of this province, Don Carlos

Trudeau, in relation to the possession which he has given to Dona Manetta Laveau Trudeau, etc." This is undoubtedly the correct translation of the words "que ha dado," and, consequently, the grant shows that possession had already been given to the grantee, and that it was based upon proceedings which had been completed before it was issued.

In that part of the grant which relates to the inclusion of the Hot Springs in the tract the following words are used : "y demas que expresa el Plano figurativo y certificacion del dicho Agrimensor Trudeau, *que antecede*, etc.," but the words "*que antecede*" ("which precedes"), are not represented at all in the translation used in the court below. They show most clearly that the figurative plan and certificate of Trudeau, upon which the grant was founded, preceded its execution, and, consequently, that no further survey was necessary in order to complete the title. The words last quoted are immediately followed by "*y reconociendo esta reglada al orden del agrimensura*, approvando como approvandos usando de la facultad que el Rey nos tiene concedida, *otorgamos* en su Real nombre al dicho Juan Filhiol, etc." The words we have italicised have been erroneously translated "and recognizing this mode of measurement" and "and assign," whereas they mean "and recognizing the same in conformity to the order of survey," and "we grant," which were the translations made of the same words in the Castant case, and which conform to the usual signification of the language used. We are satisfied that an examination of the original grant will convince the court that the translation used below was imperfect and erroneous in the particulars named and that the true version of the grant shows conclusively that it was intended to vest in the grantee a complete title without any further act by him or by the official authorities.

Upon the record as it stands, this is, perhaps, all that need be said in support of the regularity and validity of the grant,

but, inasmuch as a strenuous effort was made in the court below, and will probably be made here, to prove, notwithstanding the recitals in the grant, and the admissions made by the demurrer, that no actual survey was ever made, it may be proper to submit some suggestions on that particular part of the argument. How the defendant in error can be heard to argue that an admitted fact does not exist, we are at a loss to understand; but, the argument has been made, and we will briefly examine it. First, it is contended that no survey was made by Trudeau after the grant of February 22, 1788, was executed, which, if true, is wholly immaterial; because the only survey required by the regulations and usages of the province was, according to the admitted allegations of the complaint, and the recitals in the grant, made and certified before that date, and was examined and approved by the governor when he finally acted on the application. Next, it is insisted that Trudeau's certificate is not an instrument of evidence, "because it neither purports to be nor is, an official document," and yet the certificate states on its face that he was when he made it, "land and particular surveyor of the province of Louisiana," and the authority cited by counsel, Johnston *vs.* Staines, 2 Ohio, 55, shows, that, if the official character of the person signing the certificate appears in it, "This *prima facie* would be sufficient to authorize the record, and to throw the proof on the person impeaching the deed." But the court knows judicially, not only as a historical fact, but from its own records and judgments in a great number of cases, that Trudeau was the surveyor-general of the province of Louisiana in 1788, and for a long time afterwards, and, even in the absence of these sources of information, it would be bound to assume, until the contrary was shown, that all persons acting in official capacities in the ceded territory were officers *de jure*.

But, according to the view which we have taken of this case, the certificate of Trudeau, although competent evidence of the

facts recited in it, is not an essential part of the evidence exhibited with the complaint, and would not be, even if the demurrer did not admit the anterior surveys. It certifies an act done in the past; it does not purport to be a certificate of a survey or measurement made on the day that it was itself made, and, while it is admissible to corroborate the recitals in the grant, that he, Trudeau, had made the "anterior surveys," it constitutes no necessary part of the title, using that word in the Spanish sense, because the grant itself, with its recitals is sufficient, until impeached by pleading and evidence. He does not certify merely that he had made a figurative plan, as seems to be assumed, but that he had "measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial, situated on the north side of the Ouachita river, at about two leagues and a half distant from said river, to be *verified* by the figurative plan which accompanies," that is, the figurative plan is referred to for the purpose of identifying the tract, which he certifies he had actually measured.

Much of the argument on the other side is predicated upon the assumption that a "figurative" plan and a "conjectural" plan are the same, when, in fact, they are very different things. "Figurative" means "of a definite form or figure," while "conjectural" means "fancied, imagined, guessed at, undetermined, doubtful." The decisions of this court, and the Spanish grants, orders of survey and returns of the surveyors, show that the words "figurative plan" are almost invariably used to indicate the plan made upon an actual survey and measurement of the land. In fact, no other expression is ever used in the Spanish documents, so far as we have been able to discover. The conjectural plan was not made by the official surveyor, or by any other surveyor; it was merely a rough sketch, or diagram, showing in a general way the location of the land applied for, and could be made by the applicant himself. No matter by whom made, it did not, in any case, constitute the basis of a grant.

In the case of United States *vs.* Castant, *supra*, the original record of which we have examined, there was, as already stated, no order of survey made, except orally, to Trudeau, who simply adopted a survey made by a deputy surveyor, and afterwards certified that he "had delivered possession" of the land "corresponding with the figurative *plan or survey;*" and this certificate was admitted in evidence, and the grant was decided to be regular and valid. "I certify having measured," or "having delivered possession," are the forms of words commonly used by the Spanish surveyors, as the court will see by an examination of the numerous cases that have heretofore been presented for its consideration, and it will also be seen that the certificate was not usually contemporaneous with the act certified, but was made some time afterwards.

As was said in United States *vs.* Hanson, 41 U. S., 196:

"There is a wide and marked difference in the effect of the certificate of the surveyor-general and a private individual, who assumes to certify without authority. What the duties of the former are is well known from the proofs in many cases presented to this court" (page 199). * * *

"The duty of confirmation, by the acts of Congress, is deputed to the courts of justice of the United States in execution of the treaty with Spain. It follows, the same evidence, that was accorded to the return of the surveyor-general by the Spanish governor, before the cession, is due to it by the courts of this country. The acts of the officer and the governor were both on behalf of the government; each, by his duty, was bound to protect the public domain, and to guard the law from violation; if the surveyor, therefore, by his plat and certificate, returned that he had surveyed the land at the place granted, not by the assertion only that it was at the place, but by a description in legal form that it was so, then the return was *prima facie* competent evidence, without further proof, on which the governor could found the confirmation. Plats and certificates, because of the official character of the surveyor-

general, have accorded to them the force and character of a deposition: the same as Aguilar's certificate to a copy of the grant; as we held in the case of Wiggins, 14 Peters, 346," pp. 199-201. See also United States *vs.* Low, 41 U. S., 162; Breward *vs.* United States, 41 U. S., 143, in both which it was expressly decided that the official return of the surveyor-general must have accorded to it the force and effect of a deposition.

While the certificate does not contain a full description of the land, by metes and bounds—which were not required in any case to be included in that document—it states, that he had measured the league of land indicated in the memorial and refers for identification, to the figurative plan "which accompanies" and which, with the procès verbal, is alleged in the complaint to have been lost. The certificate is legal evidence of the fact that he had measured the tract "to include the spot known by the name of the Warm Waters," which it was the expressed purpose of the governor to grant, and that he had thereby, according to the rules of the Spanish law, put the grantee in possession of that particular "site or locality." This court said in the Arredondo case, that "possession does not imply occupation or residence, but every man is in the legal seizin and possession of land to which he has a perfect and complete title;" and in Scull *vs.* United States, 98 U. S., 410, and many other cases, it was held, that the legal effect of a survey, under the laws of Spain, was to put the grantee in the instant possession of the land, unless it was at the time occupied by the Indians, in which case he had legal possession, but his right of actual occupancy did not accrue until their title was extinguished.

Our position on the point now under consideration is, that the second certificate of Trudeau was wholly unnecessary as evidence of title or possession, because the surveys, procès verbal and certificate made before the grant was issued, and recited in that instrument, constituted a full compliance with the laws,

regulations and usages in force in the province, and because the grant itself purported to be, and was, a complete divestiture of the title of the crown.

The rules and principles by which this and other courts have tested the validity of grants for land in the territory acquired from Mexico under the treaty of Guadelupe Hidalgo, and by the subsequent purchase, are essentially different in many respects from the rules and principles applicable to grants made in the territory acquired from France by the treaty of 1803, and it is apparent that a failure to observe the distinction between them lies at the foundation of many of the erroneous conclusions reached by the court below in its opinion in this case. In Mexico, the authority of officials to make grants was expressly defined and limited by legislative enactment in 1824 and by positive regulations adopted in 1828, and the officials had no power to make a substantial departure from the requirements of the law and regulations. Unlike the royal governors of the Spanish provinces, they had no general or independent authority to make grants of the public lands, or to alter the manner or form in which they should be executed in order to pass complete titles to the grantees. Every substantial requirement, even in matters of form and procedure, had to be substantially complied with, not only by the grantee, but by the official as well, and a failure so to comply with them vitiated the grant; or, at least, prevented it from passing a perfect legal title, whatever the equities created by it might be. Certain requirements of the law and regulations were very properly held to constitute conditions precedent, and others, conditions subsequent, all which had to be substantially performed, or the title would not vest in the first instance; or, having vested, would be defeated afterwards. But this was not a rule that could be properly applied to grants in the Spanish provinces acquired in 1803, as we have already endeavored to show, and, consequently, very few, if any, of the decisions on Mexican grants have any bearing upon the questions involved in this case. See Fuentes *vs.* United States, 63 U. S., 443.

In Hornsby *vs.* United States, 77 U. S., 224, the proceedings necessary in obtaining grants of land from the government of Mexico under the law of August 18, 1824, and the regulations of November 21, 1828, are stated in considerable detail, and the effect of a failure to comply substantially with all the requirements is considered and decided. The case shows, however, that, notwithstanding the limited authority of the officials, a strict and literal compliance with all the requirements and laws will not be exacted in order to make the grant valid, and that many presumptions arise in favor of the regularity and legality of the proceedings.

The position we have taken as to the finality of the grant in controversy, and its conclusive effect as evidence of title in the grantee, is justified by the subsequent proceedings of the Spanish authorities in Louisiana on the 25th day of November, 1803, when Filhiol made the conveyance, or passed the title, to his son-in-law, Bourgeat. As already stated, the new regulations of Morales were not promulgated until July 17, 1799, more than eleven years after this grant was made, and, consequently, they could not in any manner effect the regularity or validity of the grant itself; but they were applicable to all subsequent private conveyances of land *obtained by concession*, and, therefore, the deed, or act, by which Filhiol conveyed, or passed, the land to Bourgeat, was governed by them. The seventh article of the Morales regulations is as follows:

"To avoid for the future the litigations and confusions of which we have examples every day, we have also judged it very requisite that the notaries of this city and the commandants of posts shall not take any acknowledgment of conveyance of land obtained by concession, unless the seller (grantor) presents and delivers to the buyer the title which he has obtained, and in addition being careful to insert in the deed the metes

and bounds and other descriptions which result from the title, and the *procès verbal* of the survey which ought to accompany it." 2 White's Comp., 236; 5 Am. Stat. Papers, 591.

Thus, the conveyance or act passing the title of land which had been obtained by concession from the crown was made a judicial proceeding before the notary or commandant, as the case might be, and this was done, evidently, from the language of the order, to prevent the confusion resulting from the conveyance of lands to which the "seller" had not acquired the complete legal title by grant. The title—that is, the papers showing the title—had to be presented and delivered to the purchaser in the presence of the official, and the metes and bounds and other descriptions "resulting from the title" and the *procès verbal* were required to be inserted in the deed; and the notaries and commandants were forbidden to sanction the transaction, unless these conditions were complied with. That this was a judicial act having all the force and effect of a judgment or sentence, according to the Spanish civil law, cannot, we think, be doubted. The very object of the ordinance or regulation was to have the validity of the title ascertained and attested by a public officer, who was responsible to the governor and the king for all his official acts; and it must be borne in mind that the separation of the legislative, executive and judicial functions, which constitutes one of the most valuable features of our institutions, was, at that time, wholly unknown to the Spanish system of government. Judicial power might be, and frequently was, conferred upon officials whose ordinary duties were purely executive or ministerial. That this was a judicial act is shown by all the authorities on the subject.

On the 17th day of July, 1803, President Jefferson addressed a letter to Daniel Clarke, enclosing a series of questions concerning the boundaries, population, trade, etc., of the province of Louisiana, and the state of its laws and regulations pertaining to grants of land and other matters, and the answer to these questions, but without date or the name of the author, is given

in 2 White's New Comp., p. 690. For Mr. Jefferson's letter, see Jefferson Manuscripts, Department of State, Vol. 9, Series 1, No. 109. In the answer which, also, is in the Department of State, it is said: "The governor (in his civil capacity) is sole judge of the supreme tribunal of the province. Two alcaldes, hold, each an inferior tribunal in the same place (city of New Orleans) and the commandants of the districts are judicial officers within their jurisdictions." Speaking of the alcaldes or syndics, he said, "they are conservators of the peace, take cognizance of petty complaints, and report the state of his quarter to the commandant. This magistrate (the commandant) keeps the records of his district, and officiates as a notary in passing all sales and bargains, and transfers of real property, which, under this government, are not valid when done between private persons: every document of this nature is in the original matter of record, and the parties are furnished only with copies certified by the commandant (or notary where there is one established) which are received as evidence in courts of justice within the province." 2 White's New Comp., 965–6. White, who was thoroughly versed in the Spanish language, laws, regulations and customs, says in his opinion on the Renaut claim:

"Every sale before a governor or commandant, under the Spanish government, is equivalent to a judicial sentence, and is, in fact, in all respects, the approval of the title of the grantor. The officers before whom a Spanish bill of sale is passed are bound to see that the person making it exhibits his title and that title in the *first sale* is the grant from the proper officer of the crown. The purchaser takes a notarial copy of the bill of sale, which he exhibits to succeeding vendees in the deraignment of title to the last holder. Concessions upon conditions cannot be conveyed until there is proof of the performance of the condition. In the case of Renaut, his grant was absolute; and, by the French laws, that grant was exhibited to the notary as evi-

dence of his right to sell, and it is made the duty of the notary to see that he has a complete *bona fide* title.

"In the tribunals of France and Spain, upon a suit to recover possession of lands, what we would call the plaintiff in ejectment, is only bound to exhibit his notarial bill of sale, which is conclusive without deraignment of his title, under their peculiar system." 1. White's New Comp. App., 719-20.

According to the Spanish law, although all the preceding evidences of title might be lost or destroyed, it would not be necessary even to account for them, or prove their contents, as the judicial sentence of the commandant or notary, unless properly impeached, would be conclusive of the fact that all the necessary proceedings had been taken, and that a complete legal title had been vested by the grant from the crown, giving to the grantee full ownership of and dominion over the property, with a lawful right to sell and convey it. Even in the case of public officers whose functions are not judicial, the legal presumption is that they have not exceeded their powers, or executed them in a defective or erroneous manner, and this rule applies to the acts of foreign as well as domestic officials. After stating the familiar proposition that an official act is *prima facie*, regular and valid, this court said in Stother *vs.* Lucas, *supra*: "The same rule applies to the judicial proceedings of local officers to pass the title to land according to the course and practice of the Spanish law in that province"—page 438. See, also, Murdock *vs.* Gurley, 5 Rob. (La.), 457; 17 La., 220; Choppin *vs.* Michael, 11 Rob., 236, in which the court also said sales of land in parole were valid under the Spanish law. But we deem it unnecessary to multiply authorities in support of this elementary principle of the common and civil law, principle which is absolutely essential to the orderly administration of justice by the courts and the effective execution of the law by executive and ministerial officers.

The regulations of Morales did not require the commandant

or notary to make any certificate, but it was the custom to do so, and in this instance Don Vincente Fernandez Feijeiro certifies that he was military and civil commandant of the district and jurisdiction at the date of the act; that the parties were known to him; that the act was affirmed and witnessed by Baron de Bastrop and others, whose names are given, and that it was done within his jurisdiction. Nor did the regulations require the presence, as witnesses, or otherwise, of persons other than the commandant, or notary and the parties, when the act was done; but if the attestation of the other subscribers added nothing to the authenticity of the deed, it certainly detracted nothing from it. The practice, however, of having these acts or deeds executed in the presence of others besides the commandant, or notary, appears to have been customary, and the extent to which custom and usage entered into and became a part of the law in the Spanish provinces, is shown in several of the decisions heretofore cited.

Although the treaty was made April 30, 1803, formal possession of the territory embraced in it was not delivered to the United States until December 20, 1803, and it is the established rule that the laws of a conquered or ceded country remain in force until actually altered by the new sovereign. Keene *vs.* McDonough, 33 U. S., 308.

It will be observed that the regulations of Morales required the notaries and commandants, when titles were passed before them, to be "careful to insert in the deed the metes and bounds and other descriptions which result from the title, and the procès verbal which ought to accompany it," and a reference to the conveyance from Filhiol to Bourgeat shows that it contains a full description of the land, which must, under the regulations, have been taken from the plan and procès verbal produced before the official at the time. The deed describes "a tract of land with a front of eighty-four arpents and a depth of forty-two arpents on each side of the stream called 'La source d'eau Chaude,' about two leagues distance from its en-

trance into the Ouachita, having the Hot Springs for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the crown" [Rec. 13]; and the fact that it contains this particular description of the land, which could have been legally procured only from the title and procès verbal, is evidence, if any were required, that the regulations were complied with by the production of the documents before the official when the conveyance was made. It is alleged in the complaint, and admitted, that the lost survey and procès verbal described the land as set forth in this deed.

The commandant had no authority to insert in the conveyance any other description than that found in the title presented by the grantor; and if the conveyance was, under the laws of Spain, a judicial act, as we have endeavored to show it was, the existence of the plan and procès verbal, with a good and sufficient description of the land granted, is conclusively established, so long as the proceeding stands unimpeached. The legal effect of such evidence cannot be avoided by mere inferences or surmises that the description might have been procured from other sources, for, under the law, the official had no right to procure it from any other source, and, until his conduct is successfully impeached, the court is bound to assume that he performed his duty.

If there was, as is alleged and admitted, and as is also shown by the judicial sentence of the Spanish tribunal, an official survey and procès verbal describing the land, and a report or certificate of the surveyor, it was not necessary that such description should be inserted at length in the body of the grant. Under the regulations, the procès verbal was required to be annexed to the grant, and constituted a part of the title. In United States *vs.* Boisdoré, *supra*, the court said that, if the land had been surveyed by Trudeau and he had certified that it was at the place granted, and the survey had been returned, "then such survey would identify the land granted;" and in

Carondelet *vs.* St. Louis, 66 U. S., 179, the court said: "If there be no boundary, the grant is vague and cannot be identified, and the grantee takes nothing. The survey here was the completion of the title, although it succeeded the act of granting the land. It defined the grant." See also Blake *vs.* Doherty, 18 U. S., 359; Magwire *vs.* Tyler, 75 U. S., 650; Cox *vs.* Hart, 145 U. S, 376; Scull *vs.* United States, 98 U. S., 410.

In Buyck *vs.* United States, 40 U. S., 215, the court said: "We apply to the case the laws and ordinances of the government under which the claim originated; and that rule, which must be of universal application in the construction of grants, which is essential to their validity, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony." United States *vs.* Miranda, 41 U. S., 153; United States *vs.* Lawton, 46 U. S., 10; Villalobos *vs.* United States, 51 U. S., 541; De Vilemont *vs.* United States, 54 U. S., 261; United States *vs.* Clamorgan, 101 U. S., 822. In the present case, the plaintiffs in error do not rely upon extraneous testimony, but upon an official survey and procès verbal, which are alleged to have been regularly made at the proper time, and which constitute a part of their title, but are not actually exhibited because they have been lost.

It appears, therefore, from the admitted allegations of the complaint, from the official recitals in the grant itself, and from the judicial sentence of the commandant on the 25th day of November, 1803, while the Spanish authorities were still in possession and control of the ceded province, that Filhiol held a complete and perfect title to the land in controversy, by the concession or grant from Governor Miro.

The failure to use any word or clause designating a surveyor, or indicating a purpose to execute a further assurance of title, considered in connection with the regulations and practice under them, the absolute terms of the grant itself, its recitals,

and the subsequent judicial sentence by a tribunal, provided for the express purpose of passing upon the validity of titles held by concession, ought to be conclusive of this question. That tribunal had before it the original grant and other papers connected with it, written in a language which it was competent to interpret, and attested by signatures with which it was familiar, and it cannot be presumed, contrary to its unimpeached judgment, that the title was an imperfect one under the laws of the province in which the land was situated.

Don Juan Filhiol was a distinguished and trusted official in the Spanish service, and the land granted to him was situated in his district and jurisdiction, not very remote from the post of Ouachita, at which he was stationed. All that was said about the land being located in the midst of an impenetrable wilderness and occupied by hostile Indians, is foreign to the case, even if true; but there is no evidence of it, and, on the trial of a demurrer, there could be none, except such as is afforded by the authentic history of the country at that period. We know that region of country was occupied by the Quapaw Indians, but they were peaceable, and held the land in subjection to the superior title of the Spanish crown. There is nothing to show that Filhiol and Trudeau and his deputies might not go upon this land without molestation or hindrance, whenever they chose, and, in fact, the latter made many surveys in that part of the country, as will be seen by a reference to numerous decisions of this and other courts. Filhiol was commandant of the district, having many official duties to perform respecting the Indians, and it is not unreasonble to suppose that he was in communication with them, and was at least acquainted with their chief men, and quite familiar with the locality known as the "Hot Waters." It is a well known historical fact, that he made a very full official report on that part of the country to Governor Miro, in 1786, about one year

before his application for this grant. That it was practicable to make an actual survey of this land in 1787 and 1788 would scarcely be open to controversy, even in the absence of allegatiens and admissions that such a survey was, in fact, made.

The Indian occupancy was made the basis of a contention that the grant was void, and this was insisted upon, in opposition to the very authorities cited by counsel for defendant in error in the argument below. The power of the British authorities to make valid grants of land in Florida, subject to the Indian right of occupation, when that country was held by Great Britain, and the power of the Spanish authorities to make similar grants in Louisiana and elsewhere within the jurisdiction of Spain, has been to often asserted by this court, to be questioned or re-argued now. In Mitchell *vs.* United States, 34 U. S., 711, which involved a British grant in Florida, the court said that, "subject to this right of possession, the ultimate fee was in the crown and its grantees; which could be granted by the crown or colonial legislature while the lands remained in possession of the Indians; though possession could not be taken without their consent;" and in Chouteau *vs.* Malony, *supra*, involving a Spanish grant, the power of the governors of provinces to grant public lands "to which a title and instant possession could be given to the grantee" was recognized, but it was held, that in making sales of lands occupied by Indians they were bound by certain laws, usages and customs made for the protection of the Indians, and then it was said that "they" (the grants) "did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize any one to interfere with it." This rule has been re-affirmed in many cases; and there are none to the contrary, so far as we have been able to discover. See United States *vs.* Fernandez, 35 U. S., 303; Johnson *vs.* McIntosh, 21 U. S., 543, where this question is fully discussed by the court.

The quotation from Marsh *vs.* Brooks, 55 U. S., 513,

relied upon on the other side, had no reference whatever to grants made by the Spanish crown. The court was then discussing a question arising under the treaty between the United States and the Sac and Fox Indians; but the case, involved, also, the validity of a Spanish grant made while the land was occupied by the Indians, and the grant was sustained. The court said that "the county and town of St Louis, the seat of government of Upper Louisiana during the existence of the Spanish colonial government there, the post of New Madrid, the county, town and post of St. Charles were all within the cession made by the Osages; and within which cession lay a great mass of Spanish orders of survey and grants, in regard to which this country has been legislating and adjudicating for nearly fifty years, without any one ever supposing that such concessions were affected by these loose Indian pretensions set up to the country at the time when the concessions were made; pretensions that the Spanish government notoriously disregarded, further than a cautious policy required."

The proposition established by all the decisions upon this question is, that grants made by the Spanish authorities while the land was occupied by the Indians were valid and passed the legal title, but that the grantees took the land subject to the Indian right of occupancy, and, therefore, were not entitled to enter and hold actual possession until that right was extinguished.

One of the many unusual features of the argument in this case is, that the statute of limitations is invoked to sustain a demurrer to a complaint which alleges a wrongful possession of land for only a little more than two years. We admit that, if the plaintiff, in an action for the recovery of real estate, should allege in his complaint that the defendant had been in the continuous possession of the land for a longer period than that prescribed by the statute, holding and claiming it as his own

against the plaintiff and all others, and that he, the plaintiff, was not entitled to the benefit of any saving clause, or other exemption, a demurrer might lie, because the party would have plainly negatived his own right; but there is no such case presented here, and we cannot suppose that one ever will be presented. The application of statutes of limitation does not depend upon the age of the plaintiff's title, but upon the duration and character of the defendant's possession, and it would be a manifest perversion of the law to permit one man to take possession of vacant land belonging to another and hold it against him and his heirs simply because the title of the owner was old.

The only statute relied upon as a bar by counsel, in the argument below, was the act of June 11, 1870 (16 Stat., 149), which authorized any person claiming title to the whole or any part of the four sections known as the Hot Springs reservation, to institute suit against the United States in the Court of Claims, and providing, that, "no such suits shall be brought at any time after the expiration of *ninety days* from the passage of this act, and all claims to any part of such reservation upon which suit shall not be brought under the provisions of this act within that time, shall be forever barred." This was an enabling act, authorizing suits to be brought against the United States, which, otherwise, could not have been maintained, and conferring jurisdiction upon a special tribunal, which, otherwise, could not have heard the cases. It was really intended to provide for the settlement of certain claims of a different character from this, then being urged before Congress, but its provisions were sufficiently comprehensive to embrace this case, as was afterwards decided by the Court of Claims. Filhiol *vs.* United States, 28 Ct. of Claims, 110.

It would be unreasonable in the highest degree to suppose that Congress, even if it had the power, which we deny, intended to confiscate perfect titles to land held by citizens residing more than a thousand miles from the place where the

court was held, simply because they might fail to sue within the short period of ninety days. It is more than probable that the plaintiffs in error never even heard of the act until long after the prescribed time had expired. But the Court of Claims, in the case referred to, gave the act a just and reasonable construction, holding that the bar was upon the jurisdiction of the particular tribunal, and not upon the right of the claimant or title-holder; and this was in accord with the decision of this court in United States *vs.* Percheman, *supra*, where more than a year had been allowed by the act. The provision was, that all claims not filed within the time prescribed were "to be void and of none effect," but Chief Justice Marshall said: "It is impossible to suppose that Congress intended to forfeit real titles not exhibited to the Commissioners within so short a period;" and he held that the only effect of the provision was to prevent the Commissioners from allowing claims not presented within the time.

The court below, however, held that this action was barred, not only by the act of June 11, 1870, relied on by counsel, but, also, by the act of May 26, 1824, providing for the institution of suits to try the validity of claims to land in the State of Missouri and the Territory of Arkansas (4 Stat., 52), which was several times extended, the last extension having been made by the act of June 17, 1844 (5 Stat., 676). If the plaintiffs in error have not a complete legal title to the land in controversy, they cannot recover in this action, no matter whether it is barred by statute or not; if, on the other hand, they have a complete legal title, it is perfectly clear that it is not barred by the statute of 1824, or by the acts passed from time to time continuing that act in force; because this court has always held that they embraced imperfect titles only. In United States *vs.* Castant, *supra*, the judgment of the court below was reversed on the ground that the title was a perfect one, and, therefore, could not be submitted to the court under the law. Magwire *vs.* Tyler, 75 U.

S., 650; United States *vs.* Wiggins, 39 U. S., 334; United States *vs.* Roselius, 56 U. S., 31; United States *vs.* Davenport, 56 U. S., 1; United States *vs.* Reynes, 50 U. S., 127.

Complete titles to land in the territory acquired from France by the treaty of 1803, this court has declared, needed no legislative or judicial confirmation; they were fully protected by the third article of the treaty itself, which is a part of the supreme law of the land, and, until abrogated, is as binding upon the courts as a provision of the Constitution. It is the duty of the United States to protect such titles, and if the lands come into their possession, they are held in trust for the Spanish grantee or his heirs, and a State cannot forfeit them by a limitation law; and, if it should attempt to do so, and the courts of the State should sustain the validity of the act, a case would be presented for the exercise of the appellate jurisdiction of this court, in order that the Constitution of the United States, and a treaty made in pursuance of it, might be vindicated and enforced. In such a case, the question would be directly presented, whether a State of the Union could, by legislative enactment, destroy a right which the United States, by a treaty made in pursuance of the constitution, had agreed to protect. Although the several American States, during the revolutionary war, were *de facto*, as well as *de jure*, in the possession and actual exercise of all the rights of sovereign and independent governments, this court held in Ware *vs.* Hylton, 3 U. S., 199, that an act of the State of Virginia, passed in 1777, permitting creditors to pay debts due to British subjects into the treasury of the State, and thereby discharge the obligations, was annulled by the provisions of the treaty of peace with Great Britain, concluded in 1783, and that the debts were revived and could be sued for and collected. The act was passed and the treaty was made before the formation of the constitution, but the court gave to the constitution a retroactive effect, and held that the treaty annulled the State law and revived the debts. Upon the principles established in that case, which have never

been disputed, it seems quite clear that no State could forfeit or destroy a title derived from a grant which the United States are bound by treaty to protect, and that, should it be apparent that a State limitation law would have that effect, the courts would be compelled to declare it null and void, so far as it applied to such grants. Treaties can be abrogated or repudiated only by the political department of the government, and, while they remain in force, it is the duty of the judicial tribunals of the United States, when a proper case arises, to see that all the rights secured by them are respected.

Congress can declare when and in what manner, and within what time, suits may be instituted against the United States, because they are not suable at all, except by permission of that body; but it has no power to pass laws prescribing the time within which individuals may bring suits against each other in the State courts, or in the courts of the United States sitting in the States, except by taking away the jurisdiction of such courts after a certain period shall have elapsed, which would, of course, leave the titles of the parties unimpaired. It may declare that no suit shall be maintained in the courts of the United States to recover real estate which has been adversely held for a stated period; or, in other words, it can deprive the party of a remedy in the courts of the United States in such cases, but it cannot bar or destroy the right of the real title-holder, so as to prevent him from suing anywhere else His right would still exist, notwithstanding the legislation of Congress, and might be asserted wherever a tribunal could be found with jurisdiction to enforce it.

If the grant to Filhiol invested him with a valid legal title, the land in controversy became his property, and, at his death, became the property of his heirs at law; and, as such, it was, and now is, protected, not only by the treaty and international law, but by every guarantee in the constitution. The United States, as parties to the treaty, cannot hold it adversely, according to the legal definition of the term, without violating the

obligation imposed by a treaty. If they could take possession of lands legally granted by Spain to an individual and hold them adversely to the real owner, thereby acquiring a title superior to the one they had agreed to protect, or, which is the same thing in effect, thereby defeating a title which they had agreed to protect, the stipulation in the treaty and the rule of international law, which this court has always recognized, would be of no practical value whatever. Such a construction of the rights and obligations of the parties would enable the United States, which cannot be sued except with their own consent, not only to appropriate the very titles they had solemnly agreed to protect, but to take the property of the citizen without his consent and without making compensation, as required by the constitution.

But when and how did the United States acquire such an adverse possession of the land in controversy as would entitle them to rely on a statute of limitation against the perfect title of a Spanish grantee? The Indian title was not extinguished until April 24, 1818, and the grantee had, therefore, no right to enter and occupy the land until that date; and nothing more was done by the United States until April 20, 1832, when a public reservation was provided for, but no actual possession taken. It was not even surveyed until 1838. At what date any one who could have been sued by the plaintiffs in error was actually put in possession of the particular parcel of land in controversy does not appear, but, whenever it was, the person went there as the agent or tenant of the United States, and held possession for them, that is, the United States, by their agents or tenants, have been, and are now, holding the possession of land, which, if the Spanish grant was valid, rightfully belongs to another, whose title they have, by a treaty, guaranteed and agreed to protect. The relations existing between the parties forbid any inference or presumption in favor of an adverse possession; if it exists, or has ever existed, it involves the renunciation of a trust and the violation of a treaty,

and, if it can be established at all in such a case, it must be done by evidence of unequivocal and notorious acts or declarations demonstrating a purpose to exclude the real owner and all others, and to claim the title free from any trust or judiciary obligation of any kind.

This case is clearly distinguishable from Stanley *vs.* Schwalby, 147 U. S., 508, in which the court, though not expressly deciding that the United States could plead a State statute of limitations, held that a public officer in possession of property owned or claimed by the government, when sued in tort, might protect himself by such a plea. In that case, the United States had purchased, paid for and improved the land, without notice of any outstanding title, and had incurred no obligation to protect the rights of the real owner if one should present himself. They held the land in precisely the same manner that individuals ordinarily hold their estates, subject to no trusts or obligations in favor of other claimants; but, notwithstanding these facts, Mr. Justice Field dissented in an opinion to which we beg leave to refer for a citation of authorities and for a definition of adverse possession. Of course, one who confesses that he holds as agent or tenant of another cannot plead adverse possession in himself, because that would be inconsistent with the admitted agency or tenancy; he must rely upon the adverse possession of his principal or lessor, and, if the principal or lessor is, by reason of a trust or a covenant, disabled from disputing the title of the plaintiff in that manner, so is the agent or tenant.

If the plaintiffs in error have failed to show in their pleadings that a valid grant for the land in controversy was made to their ancestor, they have no case; but if they have shown that such a grant was made, we respectfully submit that no statute of limitations can be successfully pleaded against them by either the United States or their agents or tenants, and that, most assuredly, no such statute can be applied by the court on the hearing of a demurrer.

The doctrine of abandonment, which was relied upon in the court below, has no application to perfect titles. Where a party neglects for an unreasonable time to take the necessary steps to complete his title, or fails for an unreasonable time to perform conditions upon which the grant was made, or fails, when reasonable opportunity has been offered, to apply for the confirmation of an incomplete title, it may properly be held that he has abandoned such rights as he originally had; but if he has completed his title, and there are no conditions attached to it, as is the case here, no rule of law or equity will justify a court in declaring that it has been abandoned, unless there has been some element of fraud or deception in his conduct, whereby others have been induced to acquire, in good faith, rights or interests in the property which it would be unjust to disturb.

In a case like this, where no intervening rights are shown, and where the property continues to be held by the original grantor, or by another who has succeeded to the rights and assumed all the obligations of the original grantor, it would be grossly inequitable and unjust to presume an abandonment from mere lapse of time. In every case the question depends upon facts and circumstances which cannot properly be alleged in the complaint and cannot be inquired into on a demurrer. Lapse of time is only one of the facts to be considered, and is not of itself sufficient to defeat a recovery, for, as this court said in Stanley *vs.* Schwalby, *supra*: "In the case of a government, protest against the occupancy and application for redress in the proper quarter would seem to be quite as potential in destroying the presumption of the right to possession or of the abandonment of claims by another, where an action cannot be brought, as the action itself when it can." The history of this grant and the claim under it, when disclosed at a trial on the merits, will show that neither the title nor the right of occupancy, which did not accrue until 1818, has ever been abandoned, but that, on the contrary, they have been repeatedly asserted in memorials to Congress and otherwise, and

denied only because the written evidence of title could not be produced.

A reversal of the judgment below is respectfully asked.

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